90-1818

NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM

WILLIAM R. METALLO,
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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ISSUES PRESENTED FOR REVIEW

A. Whether the respondent failed to prove an essential Jurisdictional element of the crime charged in courts three through six, mail fraud, 18 USC 1341?

B. Whether the petitioner was deprived of sixth amendment - confrontation clause - Constitutional rights by the admission of out of court statements through hearsay testimony, attributable to an out of court unnamed person?

C. Whether a general charge to the jury erroneously stated the law regarding the intra corporate conspiracy doctrine to Petitioner's prejudice?

D. Whether the trial court erroneously admitted highly prejudicial testimony regarding conduct not charged in the indictment or necessarily entwined therewith, nor qualified as 404 (b) evidence, thus depriving petitioner of due process and a fair trial?

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The petitioner, William R. Metallo, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on August 9, 1990. (See Appendix A)

The Appellate Court denied petitioner's petition for rehearing (filed 8-17-90) and suggestion for rehearing *en banc* on October 5th, 1990. (See Appendix B)

JURISDICTION

On August 9th, 1990, the Court of Appeals entered judgment affirming petitioner's conviction, and denied, on

October 5th, 1990, petitioner's rehearing petition.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> Nor shall any person. . .be deprived of life, liberty, or property, without due process of law. . .

United States Constitution, Amendment VI:

> In all criminal prosecutions the accused shall enjoy the right. . .to be confronted with the witnesses against him. . .

STATEMENT OF THE CASE

Petitioner was convicted under a six count indictment for violations of federal credit card fraud and mail fraud (conspiracy and five substantive counts), 18 USC 1029(a) and (b) and 18USC 1341. He was sentenced to a total of ten (10) years incarceration.

Petitioner timely appealed his sentence and conviction. The United States Eleventh Circuit Court of Appeals affirmed the conviction and sentence on August 9, 1990. A petition for re-hearing with en banc suggestion was filed on August 17, 1990, which was denied on October 5, 1990.

REASON FOR GRANTING THE WRIT

The Eleventh Circuit decision in the instant case is inconsistent with and contrary to Supreme Court precedent, Eleventh Circuit law of the Circuit and other circuits, in the following respect:

A. The indictment in Counts three through six charge petitioner with violations of 18 USC 1341 mail fraud. (See Appendix C)

An essential element (and a sacrosanct jurisdictional element) of the crimes in question is proof of mailings through the United States mails in execution of a fraudulent scheme. 18 USC 1341; *United States versus Tarnopol*, 561 F.2d 466 (5th Circuit 1977)

Petitioner on direct appeal raised the issue that the prosecution failed to submit evidence to prove that the documents in question were deposited in the United States mail.

However the Eleventh Circuit ruled that the government circumstantially proved that the U.S. Mail was used or caused to be used by defendant (petitioner) in execution of credit card fraud, since a witness testified that it was his company's routine policy to use the mails in the conduct of its business. The Appellate Court relied *solely* on this statement and *no other evidence* to conclude proof of the fact in question. In reaching this conclusion the court observed:

> Finally according to Metallo, his convictions for mail fraud were not supported by sufficient evidence of his having used the United States mails to carry out his fraudulent scheme 4. (m.omitted). We disagree. To establish use of the mails, direct evidence is not required; rather, [p]roof of mailing can be established by circumstantial evidence. *United States versus Massey*, 827 F.2d 995 (5th Circuit 1987). A Piedmont Airlines (sic) official testified that it was the airline's (sic) routine practice to send business correspondence by United States mail. *The*

> *evidence was sufficient to support the jury's determination that Metallo used the mail in furtherance of his fraud.* (emphasis added)

United States versus Metallo, 908 F.2d 795, 798 (11th Circuit 1990)

However, the very case the Eleventh Circuit cited (Massey, supra) as authority for its conclusion, supra, specifically limits the use of Routine practices'', as circumstantial proof of mailing:

> . . .[T]he use of circumstantial evidence does not relieve the Government of its burden of establishing use of mails 'beyond a mere likelihood or probability', *United States versus Srulonitz*, 785 F.2d 382, 387 (2nd Circuit 1986), or by more than mere speculation. *United States versus Scott*, 730 F.2d 143, 147 (4th Circuit). . . . Circumstantial evidence 'such as testimony regarding office practice' is sufficient *only* (emphasis added) so long as the circumstances proven directly support the inference and exclude all reasonable doubt to the extent of overcoming the presumption of innocence. *United States versus Brooks*, 748 F.2d 1199, 1203 (7th Circuit 1984)

Massey, Supra at 999.

Moreover the Massey Court reversed the mail fraud conviction of the appellant there, since the *only* evidence of the mailing in question was testimony of routine mailing practices, because:

> In the absence of any other evidence establishing that a mailing occurred, we must hold that the

> Government did not meet its burden of showing 'beyond a mere likelihood or probability' that appellants used the mails. Therefore we must set aside appellants' convictions on the charge of committing mail fraud.

Id at 1000.

Obviously, the Eleventh Circuit's conclusion in the instant case, that testimony of routine business practices standing alone is sufficient to prove beyond a reasonable doubt the required and essential jurisdictional element of mail fraud, is contrary to the Fifth, Fourth, Second and Seventh Circuits holdings. *Massey*, supra at 999 and the citations of the other circuits therein cited;

B. The indictment also charged petitioner, in counts 1 and 2, with credit card fraud and conspiracy to commit credit card fraud, 18 USC 1029 (a) (2) and 1029 (b) (2). (See Appendix C)

Crucial to the charges in question and the government's theory of how petitioner committed the fraud and conspiracy charged was proof that petitioner misrepresented his credibility and worth to Dun and Bradstreet (D&B), which report the alleged victim (the company who issued the credit cards) relied on to issue the credit cards in question. In other words it was the government's theory that petitioner obtained by fraud the credit cards when he misrepresented his business credit worthiness. To prove this fact the prosecution introduced through the business records exception to the hearsay rule the D&B Report in question. (*Metallo*, supra at 799) ". . . Dun and Bradstreet (Sic) records custodian, Frederick Sutter,. . .who had not personally prepared the report, explained entries on the report and testified about Dun and

Bradstreet's standard procedure for compiling such reports." Id. Also Sutter testified that the report in question was confected by a fellow D&B employee from information he received verbally over the telephone from some unidentified person, who submitted to D&B the damning information on petitioner's company. Id.

On direct appeal petitioner raised an issue as to the admission of the report and the hearsay testimony of Sutter in regard to the report. More importantly petitioner raised a sixth Amendment - confrontation clause - issue regarding the unnamed party, who prepared the document in question from information supplied by an unknown party over a telephone communication.

The Eleventh Circuit disposed of the issues by holding that admission of the evidence in question was not an abuse of discretion by the trial judge and not violative of the hearsay rule, but the Court never addressed the Constitutional - Confrontation clause - issue. *Metallo*, supra at 799.

In reaching its decision on the issues in question the lower courts not only trampled on the Federal Rules of Evidence and precendential interpretations thereof by all Circuits and this Court, the lower Courts also ignored petitioner's Constitutional Rights.

This Court in *Ohio versus Roberts*, 448 U.S. 56 (1980) held that the admission of hearsay violates the Rules of Evidence and the confrontation clause unless it is established that the declarant is unavailable and the hearsay statement in question bears sufficient indicia of reliability.

In the instant case there was no showing of unavailability of the preparer of the D&B report. In fact

the witness, Sutter, testified that the preparer of the report could have been identified and made available, but the prosecution never asked. Moreover the telephone interview with an unknown party by the out of Court and unnamed witness, who prepared the crucial document certainly cannot pass the test of trustworthiness and indicia of reliability.

Ohio versus Roberts, supra, Rule 803(6), Federal Rules of Evidence McCormick, Evidence, Section 306, page 720 (2nd Ed.1972), and the sixth Amendment - confrontation clause, United States Constitution: (R3 page 155)

C. Petitioner also raised an error of law issue pertaining to the conspiracy charge (count 1). The crux of the issue surrounds the principal pronounced profondly in *Copperweld Corp. versus Independence Tube Corp.*, 467 U.S. 75 2 (1984), wherein this Court established that a corporation cannot conspire with itself because a corporation acts only through its officers and employees, while conducting corporate business, and those officers and employees cannot conspire with the corporation, which they form an indispensable part, when acting in their corporate capacity. The principal in question is commonly known as the intra corporate conspiracy doctrine.

The appellate court disposed of this issue by holding that petitioner failed to properly object to the trial Court's general charge to the jury, which charge is contrary to the holding in *Copperweld*, supra. The appellate Court also inferred that even if petitioner properly objected to the charge in question, the case of *United States versus Hartley*, 678 F.2d 961, 972 (11th Circuit 1983) would nevertheless control. *Metallo*, supra at 4242-43). The inference is misleading however, since this Court in *Copperweld*, supra at 777, inferentially overruled *Hartley*, inter alia, with the

following comment:

> To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled

Also without merit is the appellate court's conclusion that:

> (*Metallo*, supra at 799)
> Metallo did not object to the inference that a corporation was (sic) a 'person' with whom a natural person might conspire, nor did he request any additional instruction to the effect that if the jury found that the corporation was merely Metallo's alter ego, it could not find him guilty of conspiring solely with that corporation. *6* (n.omitted)

Of course the appellate Court's conclusion begs the issue. It is axiomate that the trial judge has a general sua sponte duty to instruct the jury on the law, regardless of conduct of trial counsel.

In the instant case the trial judge not only failed to instruct the jury to comport with Copperweld, it also misled the jury with the instruction in question, since a finding by the jury that the Corporation in question is the alter ego of the defendant is not the *only* condition which precludes a finding of intra corporate conspiracy. In other words the instruction in question is incomplete in that it does not include the Copperweld holding, i.e., a Corporate officer acting in his corporate capacity during corporate activity is not individual activity and therefore only one (the corporation) is acting, not two. Moreover activity by at least two persons or entities is absolutely essential to a conspiracy violation. *Copperweld*, supra.

D. Petitioner on direct appeal also raised an issue regarding the admission of testimony that he had declared personal bankruptcy, prior to applying for the credit cards in question.

The appellate Court disposed of this issue with the following remark:

> Courts have long held that evidence of financial difficulties is admissible in fraud prosecutions to demonstrate knowledge, motive, intent, design and absence of mistake. . . .The evidence relating to Metallo's petition for bankruptcy, filed at approximately the same time that Metallo caused his corporation to apply for UATP credit cards, was probative of Metallo's knowledge, absence of mistake, and intent in obtaining and using the cards with no intention to pay Piedmont for the items charged. We cannot say that the trial court abused its discretion in admitting that evidence.

Metallo, supra at 798 - 799.

Again this conclusion by the appellate Court also begs the issue. Obviously the Court is concluding that the trial Court admitted the objectionable evidence as 404(b) evidence (Rule 404(b) Federal Rules of Evidence). However, the issue is not that the evidence in question could have been legally admitted as 404(b) evidence, the issue is that it was not admitted as such and that the trial judge, nor the prosecution, made any pretense that same is 404(b) evidence. In fact the trial judge gave no indication that he mentally and subtley conducted the balancing test, which is sacrosanct in admitting 404(b) evidence, nor did the trial judge instruct the jury on the limited use of 404(b) evidence, which is also sacrosanct to prevent inherent prejudice to the defendant. *Huddleston versus United States*,

485 U.S. - , 99 L.Ed 2d 771, (1988). *United States versus Levy*, 731 F.2d 997 (2nd Circuit 1984); *United States versus Miller*, 725 F.2d 462 (8th Circuit 1984); Rule 403, FRE.

In default of the foregoing considerations petitioner was denied procedural due process to his prejudice and detriment, making a fair trial impossible.

In summary, regarding each issue raised, petitioner submits that the trial court, with approval of the appellate court, has ignored all niceties surrounding statutory and precedential juris prudential rules necessary to a fair trial and due process. In light of this fact, completely supported by the Record and the rationale of the Eleventh Circuit decision, this Court should not only grant the instant writ, but should also take supervisory capacity over the matter to protect the integrity of the judicial system.

CONCLUSION

The writ should be granted as law and justice require.

Respectfully submitted,

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UNITED STATES OF AMERICA
Respondent

PROOF OF SERVICE

I Cloud H. Miller III Attorney for petitioner, after being duly sworn, hereby certify that a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit, was deposited in the United States mail, first class postage prepaid, this ____ day of April, 1991, addressed to the following counsel for the Respondent, pursuant to the Rules of the Supreme Court, Rule 28.5(c):

Solicitor General
Department of Justice
Washington, D.C. 20530

United States Court of
Appeals
Eleventh Circuit
56 Forsyth St., N.W.
Atlanta, GA 30303

/s/ Roger Elkind

270 Southwest LeJeune Road
Coral Gables, Florida 33134
1-(305)-444-4413

Sworn to and Subscribed before me this ____ day of April, 1991. My Commission expires:

Notary Public

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

William R. METALLO,
Defendant-Appellant,

No. 88-3767.

United States Court of Appeals,
Eleventh Circuit.

Aug. 9, 1990.

Defendant was convicted before the United States District Court for the Middle District of Florida, No. 88-00038-Cr-Orl-19, Elizabeth A. Kovachevich, J., of conspiring to commit credit card fraud, credit card fraud, and mail fraud, and he appealed. The Court of Appeals, Tjoflat, Chief Judge, held that: (1) evidence was sufficient to sustain convictions; (2) evidence relating to defendant's petition for bankruptcy was admissible as probative of his knowledge, absence of mistake, and intent in obtaining and using credit cards with no intention to pay for items charged; and (3) defendant's receipt of presentence investigation report three days prior to sentencing afforded a reasonable time to read the report and to prepare for sentencing, considering that defendant and his counsel were well aware of contents of report before they actually received it.

Affirmed.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

TJOFLAT, Chief Judge:

Willaim R. Metallo appeals from a judgment of conviction entered, on a jury verdict, by the United States District Court for the Middle District of Florida. Metallo also appeals the sentence imposed by the district court. We affirm the district court with respect to both conviction and sentence.

I.

On April 13, 1988, a federal grand jury in Orlando, Florida, returned a six-count indictment against William R. Metallo (Metallo) and his son, William B. Metallo, charging them with: (1) conspiring with each other and with other persons to commit credit card fraud, in violation of 18 U.S.C. § 1029(b)(2) (1988) (count one); (2) credit card fraud, in violation of 18 U.S.C. § 1029(a)(2) (count two); and (3) mail fraud, in violation of 18 U.S.C. § 1341 (counts three through six). The two cases were severed, and Metallo's case proceeded to trial.

At trial, the Government presented evidence tending to prove the following facts. On April 5, 1984, Piedmont Airlines issued three Universal Air Travel Plan (UATP) credit cards[1] to Metallo, Joan Jackson (Metallo's

[1] The Universal Air Travel Plan credit card allows the holder to charge hotel accommodations, hotel meals, and car rental, as well as air transportation on any domestic and most international airlines, and to draw a limited amount of cash from the issuing airline.

girlfriend), and William B. Metallo. The cards were billed to the account of American Enterprise Publishing, Inc. (AEPI) of Apopka, Florida, a corporation that listed Metallo as president, William B. Metallo as vice president, and Joan Jackson as secretary. Metallo was the sole stockholder. Throughout the following year, the Metallos and Jackson used the cards to lease a car in Florida and for trips to such places as San Francisco, New York, Rome, Tel Aviv, the Bahamas, Jamaica, Hawaii, New Orleans, and a ski resort in Vermont. On May 30, 1985, the Metallos were heading for Paris and London, with tickets charged to the UATP account, when they were arrested at the Orlando International Airport. By this time, the AEPI account had an overdue balance of some $122,000, and two of the three cards had already been confiscated upon attempted use. Piedmont had never received any payment for any of the charges.

Before issuing the cards, Piedmont had requested a credit report on AEPI from from Dun & Bradstreet, a credit-reporting service. According to the report, an AEPI representative informed a Dun & Bradstreet telephone interviewer that the corporation showed an upward trend in sales and profits and annual sales figures of more than a half-million dollars.[2] The AEPI representative's statement was false, however, during the relevant period, AEPI had little or no income, few assets of any kind, and no investors.

On July 1, 1988, the jury returned a verdict of guilty on all six counts. On September 25, 1988, the district court conducted a sentencing hearing and sentenced Metallo to five years incarceration on count one, ten years incarceration on count two (concurrent to the term imposed on count

[2] Both William B. Metallo and Joan Jackson testified that they were not the painters of the rosy financial picture given to the Dun & Bradstreet interviewer.

one), and five years incarceration, execution suspended, on each of the remaining counts (concurrent to one another but consecutive to counts one and two). Because the conduct that gave rise to the convictions occurred before November 1, 1987, the district court sentenced Metallo under the law that obtained at the time of his offenses and not under the guidelines promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984, *see* 18 U.S.C. § 3551 *et seq.*; 28 U.S.C. § U.S.C. § 991 *et seq.*

In this appeal, Metallo asserts essentially five grounds of error:

(1) The evidence was not sufficient to support his conviction;

(2) the district court erred in admitting irrelevant and highly prejudicial evidence and in admitting hearsay evidence that fell under no exception to the hearsay rule;

(3) the district court erred in charging the jury that a corporation can be a co-conspirator;

(4) the district court erred in denying Metallo's motion to continue the sentencing hearing; and

(5) the district court erred in not sentencing Metallo under the sentencing guidelines.

We address each assertion in turn.

II.

A.

Metallo claims that the evidence adduced at his trial

was insufficient to support his conviction. We have considered the evidence in the light most favorable to the Government, *see Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), and conclude that there was substantial evidence to support the verdicts on all counts.

[1] Evidence in the case indicated that Metallo applied for, obtained, and repeatedly used a UATP credit card just after he had declared bankruptcy. The credit card was billed to AEPI, which was shown to have minimal assets, and the Dun & Bradstreet report suggested that Metallo had hugely exaggerated the corporation's financial success in order to obtain the credit card.[3] No payments were made on the account, although correspondence found in Metallo's residence demonstrated his awareness that charges exceeded $122,000. From this evidence alone, a jury could determine that Metallo had committed credit card fraud by obtaining and using a UATP account from Piedmont Airlines with no intention to pay. When we consider the evidence concerning the conduct of the two other AEPI offcers, who also held UATP cards on the same account—Joan Jackson who leased a car on the UATP card, frequently traveled with Metallo, and charged airline tickets for him; and William B. Metallo, who worked and traveled with his father and frequently charged trips to the UATP account—the jury's determination that Metallo had conspired with others to commit credit card fraud is also supported.

[2,3] Finally, according to Metallo, his convictions for mail fraud were not supported by sufficient evidence of his having used the United States mails to carry out his

[3] We address Metallo's challenge to the admission of the Dun & Bradstreet report into evidence in part B below.

fraudulent scheme.[4] We disagree. To establish use of the mails, direct evidence is not required; rather, "[p]roof of mailing can be established by circumstantial evidence." *United States v. Massey*, 827 F.2d 995 (5th Cir.1987). A Piedmont Airlines official testified that it was the airline's routine practice to send business correspondence by United States mail. This evidence was sufficient to support the jury's determination that Metallo used the mail in furtherance of his fraud. *See United States v. Bowman*, 783 F.2d 1192, 1197 (5th Cir. 1986) (circumstantial evidence of bank's customary practice "more than adequate to support the jury's determination that the mailing in fact took place"); *United States v. Ledesma*, 632 F.2d 670, 675 (7th Cir.) (" 'testimony as to office practice is sufficient proof of mailing' " (quoting *United States v. Joyce*, 499 F.2d 9, 15 (7th Cir.), *cert. denied*, 419 U.S. 1031, 95 S.Ct. 512, 42 L.Ed.2d 306 (1974))), *cert. denied*, 449 U.S. 998, 101 S.Ct. 539, 66 L.Ed.2d 296 (1980).

B.

[4] Metallo claims that the district court erred in admitting into evidence (1) records and testimony pertaining to his April 1984 bankruptcy filing and (2 the financial report prepared by Dun & Bradstreet. We note at the outset that a trial court enjoys considerable discretion in determining the admissibility of evidence and will be

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[4] Metallo was charged, in counts three through six, with four violations of 18 U.S.C. § 1341 (1988), which provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five (5) years, or both.

reversed only on a clear showing of abuse of discretion. *United States v. Martin*, 794 F.2d 1531, 1532 (11th Cir. 1986).

[5,6] Courts have long held that evidence of financial difficulties is admissible in fraud prosecutions to demonstrate knowledge, motive, intent, design, and absence of mistake. *See, e.g., United States v. Whaley*, 786 F.2d 1229, 1233 (4th Cir. 1986); *United States v. Pichnarcik*, 427 F.2d 1290, 1291 (9th Cir.1970). The evidence relating to Metallo's petition for bankruptcy, filed at approximately the same time that Metallo caused his corporation to apply for UATP credit cards, was probative of Metallo's knowledge, absence of mistake, and intent in obtaining and using the cards with no intention to pay Piedmont for the items charged. We cannot say that the trial court abused its discretion in admitting that evidence.

[7] Metallo next argues that the district court erred in admitting the Dun & Bradstreet report as an exception to the hearsay rule, *see* Fed.R.Evid. 802. The business records exception, however, provides that a record, "if kept in the course of a regularly conducted business activity," and if "it was the practice of that business activity to make the . . . record," is admissible unless circumstances "indicate lack of trustworthiness." Fed.R.Evid.803(6). For a record to be admitted under Rule 803(6), " 'the person who actually prepared the documents need not have testified so long as other circumstantial evidence and testimony suggest their trustworthiness.' " *United States v. Parker*, 749 F.2d 628, 633 (11th Cir.1984) (quoting *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1259 (11th Cir.1983)).The district court permitted defense counsel to voir dire the witness, Dun & Bradstreet records custodian Frederick Sutter, before ruling on the hearsay objection. Sutter, who had not personally prepared the report, explained entries on the report and testified about Dun & Bradstreet's stand-

ard procedure for compiling such reports. After argument by both counsel, the district court stated that the key word used by the Government in response to the hearsay objection was "trustworthiness" and that the court would exercise its broad discretion to admit the report under the business-records exception to the hearsay rule.

Sutter's testimony supported the district court's finding that the document was trustworthy. The court's decision to admit the report was not an abuse of the court's considerable discretion in that area. *See United States v. Jones*, 554 F.2d 251, 252 (5th Cir.)[5] (under business-records exception, trial courts have "wide discretion in determining whether the document offered has the inherent probability of trustworthiness"), *cert. denied*, 434 U.S. 866, 98 S.Ct. 202, 54 L.Ed.2d 142 (1977).

C.

[8] Metallo's third claim is that the district court erred in instructing the jury that a corporation may be a co-conspirator. Metallo made timely objection to the instruction solely on the ground that it impermissibly expanded the indictment and thereby permitted his conviction for an uncharged offense. Count one of the indictment, however, charged that (William R.) Metallo had conspired with William B. Metallo "and with other persons known to the Grand Jury." Metallo was thus put on notice at the outset that the Government might present evidence of Metallo's involvement with persons other than his son in support of its conspiracy theory. Metallo did not object to the inference that a corporation was a "person" with whom a

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

natural person might conspire, nor did he request any additional instruction to the effect that, if the jury found that the corporation was merely Metallo's alter ego, it could not find him guilty of conspiring solely with that corporation.[6] We hold, therefore, that the district court did not err in giving the instruction over the only objection raised, *to wit*, that it impermissibly expanded the indictment.

D.

[9] Metallo's fourth claim is that the district court erred in denying his motion for a continuance of sentencing, in violation of Fed.R.Crim.P. 32(c) and Title 18 U.S.C. § 3552(d) (1988), thereby denying him the right to due process in sentencing. As currently written, both the statute and the rule demand that the sentencing court provide the defendant (and defense counsel) with a copy of the presentence investigation report (PSI), prepared for the court by a United States probation office, at least ten days before sentencing. *See* 18 U.S.C. § 3552(d); Fed.R.Crim.P. 32(c)(3)(A). It is undisputed that Metallo did not receive the report until three days before sentencing.

Section 3552(d) does not govern Metallo's case, however, because the section applies only to offenses committed after November 1, 1987, *see* Sentencing Reform Act of 1984, Pub.L. No. 98-473, § 235, 98 Stat. 2031, *amended by* Sentencing Reform Amendments Act of 1985, Pub.L.

[6] This court held, in *United States v. Hartley*, 678 F.2d 961, 972 (11th Cir.1982), *cert. denied*, 459 U.S. 1170, 1183, 103 S.Ct. 815, 834, 74 L.Ed.2d 1014 (1983), that a corporation may be found criminally liable for conspiring solely with its own officers, agents, and employees. The Government cites *Hartley* for the converse proposition that a natural person may be found criminally liable for conspiring with his own corporation. We do not reach this issue, however, since the only ground for objecting to the district court's instruction was that it impermissibly broadened the scope of the indictment.

No. 99-217, § 4, 99 Stat. 1728 (1984 Act codified as amended at 18 U.S.C. § 3551 *et seq.*; 28 U.S.C. § 991 *et seq.*); *see also Berganzo-Romero v. United States*, 732 F.Supp. 275, 277-78 (D.P.R.1985). The statute and the version of Rule 32(c) governing offenses committed before November 1, 1987, read as follows:

(c) Presentence Investigation.

(1) *When made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence [with certain exceptions not relevant here]. . . .

. . . .

(3) *Disclosure.*

(A) At a *reasonable time before imposing sentence* the court shall permit the defendant and his counsel to read the report of the presentence investigation. . . . The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

18 U.S.C. § 3562 (1982 & Supp.1984) (emphasis added), *repealed by* Sentencing Reform Act of 1984, Pub.L. No. 98-473, §212(a)(2), 98 Stat. 1987.

The record of the sentencing hearing below indicates that Metallo and his counsel were well aware of the contents of the PSI before they actually received it. The record further indicates that Metallo and defense counsel had discussed the PSI, were well-prepared to counter the information contained therein and to submit new information, and were afforded an opportunity by the court to do so. We

conclude that Metallo's receipt of the PSI three days prior to sentencing afforded a reasonable time to read the PSI and to prepare for sentencing; we hold, therefore, that the district court did not err in denying Metallo's motion for continuance.

E.

[10] Metallo claims finally that the district court should have sentenced him under the sentencing guidelines promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984, *see* 18 U.S.C. § 3551 *et seq.*; 28 U.S.C. § 991 *et seq.* This contention is foreclosed for the reason stated above: Metallo's offenses occurred before November 1, 1987, the effective date of the Sentencing Reform Act, *see supra* part D; and the November 1 implementation date applies only to crimes *committed* on or after that date, regardless of the date of conviction or sentencing. *See United States v. Burgess*, 858 F.2d 1512, 1513-14 (11th Cir.1988); *United States v. Haines*, 855 F.2d 199, 200 (5th Cir.1988) (Congress expressly limited applicability of guidelines to offenses committed after November 1, 1987. Thus the district court did not err in refusing to apply the guidelines when imposing Metallo's sentence.

III.

For the foregoing reasons, the judgment of conviction and the sentence imposed by the district court are

AFFIRMED.

APPENDIX B

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-3767

FILED Oct 5 1990

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM R. METALLO,
Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion 8/9/90, 11th Cir., 198__, ___ F.2d___).
(OCT 5 1990)

Before: TJOFLAT, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible

UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

V.	No. 88-38-Cr-Oil
WILLIAM R. METALLO WILLIAM B. METALLO	[18 USC § 1341- 5 years and $250,000] [18 USC § 1029 (b) (2) - 5 years and $250,000] [18 USC § 1029(a) (2) - 10 years and $250,000]

The Grand Jury charges:

COUNT ONE

Between on or about January 1, 1984, and on or about May 29, 1985, in Orange and Seminole Counties, Florida, in the Middle District of Florida, and elsewhere,

WILLIAM R. METALLO
and
WILLIAM B. METALLO

knowingly did combine, conspire, confederate, and agree with each other, and with other persons known to the Grand Jury, to commit an offense against the United States, to wit: knowingly and with intent to defraud, to use one or more unauthorized access devices to obtain items of value aggregating $1,000 or more, in a one year period, and said offense affected interstate and foreign commerce, in violation of Title 18, United States Code, Section 1029 (a) (2).

Overt Acts

In furtherance of this conspiracy, the defendants committed the following overt acts:

A. On or about April 5, 1984, WILLIAM R. METALLO obtainted UATP credit cards in the names of WILLIAM R. METALLO, WILLIAM B. METALLO and Joan Jackson.

B. On the dates set forth below, WILLIAM R. METALLO used the UATP cards described in Overt Act "A" to make purchases including, but not limited to, the following:

Date	Airline	Value
10/16/84	United	$1038
10/18/84	American	426
10/18/84	Eastern	526
10/18/84	Eastern	526
10/18/84	American	212
10/18/84	Delta	3809
10/18/84	Delta	3809
11/05/84	TWA	4793
11/05/84	TWA	4793
11/05/84	TWA	4793

Date	Airline	Value
11/05/84	TWA	4793
11/05/84	Pan Am	621
11/05/84	Eastern	621
11/08/84	American	59
11/09/84	Pan Am	178
11/09/84	Pan Am	178
11/09/84	Pan Am	874
11/09/84	Pan Am	874
11/11/84	Republic	130
11/11/84	Republic	130
11/11/84	Republic	130
11/11/84	Pan Am	177
11/11/84	Pan Am	59
11/11/84	Pan Am	59
11/12/84	Pan Am	118
11/12/84	Pan Am	59
11/12/84	Pan Am	59

Date	Airline	Value
11/12/84	Pan Am	59
11/15/84	American	445
11/16/84	Pan Am	118
11/16/84	Pan Am	118
11/16/84	Pan Am	398
11/16/84	Pan Am	398
11/17/84	TWA	3032
11/19/84	Eastern	1820
11/19/84	Eastern	609
11/19/84	Eastern	609
11/19/84	Eastern	526
11/19/84	Eastern	526
11/20/84	United	186
11/20/84	Delta	366
11/20/84	Eastern	760
11/22/84	Pan Am	118
11/22/84	Pan Am	118

Date	Airline	Value
11/23/84	Pan Am	683
11/23/84	Pan Am	498
11/23/84	Pan Am	498
11/27/84	Delta	416
11/27/84	Delta	416
11/27/84	Eastern	552
11/27/84	Pan Am	236
11/28/84	Pan Am	398
11/28/84	Pan Am	398
12/03/84	Delta	526
12/03/84	Delta	526
12/03/84	Delta	526
12/04/84	TWA	4790
12/06/84	Eastern	199
12/08/84	Hawaiian	379
12/12/84	American	1951
12/12/84	American	1951

Date	Airline	Value
12/15/84	American	732
12/15/84	American	732
12/17/84	Pan Am	498
12/18/84	Hawaiian	38
12/24/84	Pan Am	219
12/24/84	Pan Am	398
01/03/85	Pan Am	418
02/21/85	Delta	980
02/23/85	Delta	980

C. On the dates set forth below, William B. Metallo used the cards described in Overt Act "A" to make purchases including, but not limited to, the following:

Date	Airline	Value
10/16/84	United	$305
10/16/84	American	596
10/16/84	United	1038
10/22/84	Delta	1068
10/22/84	Delta	1068

Date	Airline	Value
10/22/84	Delta	412
10/30/84	Eastern	1980
10/30/84	Eastern	148
11/05/84	TWA	4793
11/08/84	Pan Am	89
11/08/84	Pan Am	89
11/08/84	Pan Am	59
11/11/84	Pan Am	59
11/17/84	TWA	3032
11/19/84	Eastern	609
11/19/84	Eastern	609
11/19/84	Eastern	1820
11/20/84	Eastern	30
11/20/84	Eastern	30
11/21/84	Delta	366
11/23/84	Pan Am	996
11/29/84	Republic	78

Date	Airline	Value
12/06/84	TWA	3945
12/06/84	TWA	3945
12/06/84	Eastern	199
12/06/84	Eastern	199
12/06/84	TWA	3945
12/06/84	TWA	3945
12/09/84	American	1497
12/08/84	Hawaiian	379
12/17/84	Pan Am	498
12/26/84	Delta	200
1/03/85	Pan Am	418
1/03/85	Pan Am	70
1/03/85	Pan Am	226

D. On or about May 30, 1985, WILLIAM R. METALLO and WILLIAM B. METALLO attempted to board Trans World Airlines Flight Number 808, which was scheduled to fly to New York, with connections to Paris, France.

Persons, Parties, Entities, and Terminology

At all times relevant to this indictment:

1. Piedmont Aviation, Incorporated (hereinafter Piedmont), Winston-Salem, North Carolina, is a North Carolina corporation operating in interstate commerce. Piedmont provides air transportation for passengers and freight throughout the United States and several foreign countries. Piedmont administers credit card accounts entitled Universal Air Travel Plan (hereinafter UATP) accounts, which are held by individuals and business entities throughout the United States and several foreign countries. The Piedmont UATP credit card issued on such accounts is used to purchase goods and services throughout the United States and foreign countries.

2. Dun and Bradstreet, Incorporated, 6200 Courtney Campbell Causeway, Suite 450, Tampa, Florida, is a business concern whose primary purpose is to collate busines and credit information on individuals and corporations and to provide credit ratings and short term business projections for these individuals and corporations. Dun and Bradstreet, Incorporated is headquarterd in Tampa, Florida, and is a Delaware corporation.

3. The term "credit card" as used in the indictment, means access device or card, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value. The term "original credit card" as used in this indictment, means the credit card originally issued to the individual being billed on the credit card account. The term "duplicate credit card" as used in this indictment, means a copy of the original credit card, carrying the same information as the original credit card. The term "subcard" as used in this indictment, means a credit card issued in the name of an individual other than the individual or corporation who holds the original credit card, for which the holder of the original

credit card is responsible as to billing and payment.

4. WILLIAM R. METALLO is the father of WILLIAM B. METALLO.

All in violation of Title 18, United States Code, Section 1029(b)(2).

COUNT TWO

Between on or about October 12, 1984, and on or about May 30, 1985, in Orange and Seminole Counties, Florida, in the Middle District of Florida, and elsewhere,

WILLIAM R. METALLO
and
WILLIAM B. METALLO

knowingly and with intent to defraud did use one or more unauthorized access devices (to wit: Piedmont UATP credit cards number 1030-00375-000011 issued to WILLIAM R. METALLO, 1030-00375-000029 issued to WILLIAM B. METALLO, and 1030-00375-37 issued to Joan Jackson), in a manner affecting interstate and foreign commerce, and by such conduct in a one year period obtained services and merchandise of a value aggregating in value $1,000 or more, to wit: airline tickets, lodging, meals, and other services. The "Persons, Parties, Entities, and Terminology" section in Count One of this indictment is incorporated by reterence in Count Two.

All in violation of Title 18, United States Code, Sections 1029(a)(2) and 2.

COUNTS THREE THROUGH SIX

Description of Scheme

From on or about January 1, 1984, through on or about May 29, 1985, in Orange and Seminole Counties, Florida, in the Middle District of Florida, and elsewhere,

WILLIAM R. METALLO

devised and intended to devise a scheme and artifice to defraud and obtain goods and services from Piedmont, by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be and were false and fraudulent when made; said scheme and artifice, devised and intended to be devised, being in substance as follows:

1. It was part of said scheme and artifice to defraud that WILLIAM R. METALLO formed various corporations for which there was no actual business function.

2. It was part of said scheme and artifice to defraud that WILLIAM R. METALLO applied for and received credit cards in his own name, or in the names of various corporations or other individuals.

3. It was part of said scheme and artifice to defraud that WILLIAM R. METALLO generated a self-reported Dun and Bradstreet rating which was subsequently used to support an application for Piedmont UATP credit cards.

4. It was part of said scheme and artifice to defraud that WILLIAM R. METALLO and WILLIAM B. METALLO used the Piedmont UATP credit cards so obtained to procure goods and services.

5. It was part of said scheme and artifice to defraud that WILLIAM R. METALLO did not repay Piedmont for the goods and services obtained by use of the Piedmont UATP credit cards.

6. It was part of said scheme and artifice to defraud that WILLIAM R. METALLO did not advise Piedmont and other Credit card companies of his credit history to true income.

7. The "Persons, Parties, Entities, and Terminology" section in Count One of this indictment is incorporated by reference in Counts Three through Six.

Mailings in Furtherance of the Scheme

On or about the date specified below for each count,

WILLIAM R. METALLO

defendant herein, for the purpose of executing and in furtherance of the aforementioned scheme and artifice to defraud and attempting to do so, in the Middle District of Florida, did place or cause to be placed in an authorized depository for the United States mail matter or did take or cause to be taken or received therefrom the following mail matter addressed to the individuals specified in each count:

Count	Date	Contents of Mailing	Addressee
Three	01/20/84	Piedmont correspondence reference Piedmont UATP application/contract	William R. Metallo President American Enterprise Publishing, Inc. P. O. Box X Apopka, FL 32703

Count	Date	Contents of Mailing	Addressee
Four	02/13/84	Completed Piedmont business credit report	S. C. Folger Vice President-Marketing Piedmont Airlines P. O. Box 2720 Smith Reynolds Airport Winston-Salem, NC 27156
Five	02/16/84	Piedmont correspondence confirming receipt of application	American Enterprise Publishing, Inc. P. O. Box X Apopka, FL 32703
Six	04/03/84	Piedmont correspondence with UATP cards	William R. Metallo President American Enterprise Publishing, Inc. P. O. Box X Apopka, FL 32703

All in violation of Title 18, United States Code, Sections 1341 and 2.

A TRUE BILL

_____

Foreman

ROBERT W. MERKLE
United States Attorney

By _____
Bruce Hinshelwood
Assistant United States Attorney

By _____
Roberto Moreno
Managing Assistant U.S. Attorney